No. 10-239

SUPREME COURT, U.S.
OCT 28 2010

In The
Supreme Court of the United States

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Arizona's matching funds trigger imposes a Hobson's choice on privately-funded candidates and their supporters, including self-financed candidates and independent expenditure committees. This is because the trigger guarantees that raising or spending money above a certain threshold will cause "money from the State of Arizona to flow to their opponents' coffers in equal measure." McComish Pet. App. 88. Because of this dilemma, as underscored by Circuit Judge Carlos Bea, "it makes no more sense" for privately-funded candidates and their supporters to raise and spend money on campaign speech "than for a poker player to make a bet if he knows the house is going to match his bet for his opponent." McComish Pet. App. 87. Arizona's matching funds trigger clearly burdens whether, how and when privately-funded candidates and their supporters raise or spend money on campaign speech; and it typically causes them to diminish and delay their campaign fundraising and expenditures. McComish Pet. App. 192, 195-97, 230-55, 285-86, 290-91, 296-97, 327-29.

Arizona's matching funds trigger thus deters and penalizes the exercise of freedoms protected by the First and Fourteenth Amendments by correspondingly causing the distribution of government subsidies to political opponents. In this crucial respect, Arizona's matching funds trigger is the same as all of the other matching funds triggers that have ever been enjoined or upheld by the First, Second, Fourth, Sixth, Eighth,

Ninth and Eleventh Circuits. *Compare* McComish Pet. App. 2-46 (upholding A.R.S. § 16-952) *with Daggett v. Comm'n on Gov't Ethics*, 205 F.3d 445, 466-72 (1st Cir. 2000) (upholding Me. Rev. Stat. Ann. tit. 21-A, § 1125(9) (2009)); *Green Party of Conn. v. Garfield*, 616 F.3d 213, ___, 2010 WL 2737153, *25-*28, 2010 U.S. App. LEXIS 14286, *77-*86 (2d Cir. 2010) (enjoining Conn. Gen. Stat. §§ 9-713, 9-714 (2009)); *N.C. Right to Life, Inc. v. Leake*, 524 F.3d 427, 438 (4th Cir. 2008) (upholding N.C. Gen. Stat. § 163-278.67 (2010)); *Gable v. Patton*, 142 F.3d 940, 947 (6th Cir. 1998) (upholding Ky. Rev. Stat. § 121A.030(5)(a) (1992)); *Day v. Holloran*, 34 F.3d 1356, 1359-62 (8th Cir. 1994) (enjoining Minn. Stat. § 10A.25 subd. 13 (Supp. 1993)); *Scott v. Roberts*, 612 F.3d 1279, ___, No. 10-1321, 2010 WL 2977614, *10-*14, 2010 U.S. App. LEXIS 15897, *29-*42 (11th Cir. 2010) (enjoining Fla. Stat. § 106.355 (2009)).

Consequently, despite Respondents' arguments to the contrary, the split between the circuits is not illusory; it is real, substantial and stark. Indeed, because the Ninth Circuit has refused to yield to the principles enforced in *Davis v. FEC*, 554 U.S. 724, 128 S. Ct. 2759 (2008), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the split between the circuits will not heal itself unless this Court provides clear guidance to the Nation by granting this petition.

SUMMARY OF ARGUMENT IN REPLY

Notwithstanding Respondents' arguments to the contrary, the Court should grant this petition for three reasons: 1) the parties essentially agree that this case raises issues of nationwide importance; 2) the circuit split over matching funds triggers will not be healed by elevating form over substance; and 3) both the Ninth Circuit and Respondents are demonstrably wrong to ignore *Davis'* reliance on *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 14 (1986).

I. This Petition Should Be Granted Because the Parties Essentially Agree that this Case Raises Issues of Nationwide Importance.

There are very few things on which Petitioners and Respondents agree, especially on the merits. But there is one clear point of agreement that is relevant to the standard for granting the instant petition for writ of certiorari. The parties agree that matching funds triggers exist in numerous states and local jurisdictions. *Compare* McComish Pet. 17-18 *with* CEI Resp. 32-34. The parties also agree that there is every indication these jurisdictions and others will continue to "experiment" with matching funds triggers in the absence of guidance from this Court. *Id.* This one undisputed fact establishes the nationwide importance of this case. The nationwide importance of this case is further evidenced by the Court's recent divided decision relative to the emergency request for relief in the pending challenge to Maine's matching

funds trigger. *See Respect Maine PAC v. McKee*, No. 10-2119, 2010 U.S. App. LEXIS 20545 (1st Cir. Oct. 5, 2010), application for injunction denied, No. 10A362, 2010 U.S. LEXIS 8326 (Oct. 22, 2010). Finally, the extraordinary relief afforded by this Court's June 8, 2010 decision, which had the effect of restoring the district court's permanent injunction on Arizona's matching funds trigger, is *premised* on the nationwide importance of this case. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (observing grant of stay requires "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari"). McComish Pet. App. 81. Taken together, this petition should be granted because it indisputably raises issues of nationwide importance.

II. This Petition Should be Granted Because the Circuit Split over Matching Funds Triggers Will Not Be Healed by Elevating Form over Substance.

Respondents' effort to distinguish Arizona's matching funds trigger from all others elevates form over substance. Simply put, the split among the circuits cannot be healed by drawing distinctions based on immaterial differences between each state's ancillary campaign finance regulations. All matching funds triggers cause the campaign fundraising or expenditures of privately-funded candidates or independent expenditure committees to help disseminate hostile views by triggering the government to

subsidize their political opposition. *See, e.g.*, A.R.S. § 16-952; Conn. Gen. Stat. §§ 9-713, 9-714 (2009); Fla. Stat. § 106.355 (2009); Ky. Rev. Stat. § 121A.030(5)(a) (1992); Me. Rev. Stat. Ann. tit. 21-A, § 1125(9) (2009); Minn. Stat. § 10A.25 subd. 13 (Supp. 1993); N.C. Gen. Stat. § 163-278.67 (2010). The resulting burden on the exercise of First Amendment rights by privately-financed candidates or their supporters is not offset by any of the differences in local ancillary regulations identified by Respondents in their briefs, such as differences in the mix or amount of funding available to government-subsidized candidates. Arizona Resp. 14-15; CEI Resp. 2-3, 25-32. Indeed, no matching funds system in the country bestows a benefit on *privately-financed candidates* or their supporters that could offset the burden imposed by matching funds triggers in a manner analogous to the hypothetical "across the board" contribution limit trigger discussed in *Davis*, 554 U.S. at ___, 128 S. Ct. at 2771. Therefore, it would elevate form over substance to distinguish the matching funds triggers enjoined by the Second, Eighth and Eleventh Circuits from Arizona's matching funds trigger based on local differences in the mix or amount of funding available to government-subsidized candidates.[1]

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[1] Respondents also wrongly reverse the normal methodology of judicial scrutiny under the First Amendment by urging this Court to look to the purported mix of public policy benefits and burdens of particular matching funds systems before determining whether matching funds triggers substantially burden free speech. Arizona Resp. 14-15; CEI Resp. 2-3, 25-32. As evidenced

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The bottom line is that local differences in ancillary regulations do not explain, much less reconcile, the three-four split between the circuits on the constitutionality of matching funds triggers. It is far more reasonable to attribute the split to the fact that the circuits dramatically diverge in their analytical approach to matching funds triggers. McComish Pet. 19-24. Only this Court's firm guidance can reconcile i) the Ninth Circuit's determination that Arizona's matching funds trigger insubstantially burdens free speech and triggers intermediate scrutiny with ii) the Second, Eighth and Eleventh Circuits' determination that matching funds triggers substantially burden free speech and trigger strict scrutiny, and iii) the First, Fourth and Sixth Circuits' determination that matching funds triggers do not burden free speech at all. McComish Pet. 20-23, 28-34.

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by the methodology employed in *Davis*, courts first assess the campaign finance regulation's burden on speech, then they adopt an appropriate level of scrutiny, then they consider the governmental interests proffered for the regulation, and finally they assess the fit between the regulation and its targeted governmental interests. *Davis*, 554 U.S. at ___, 128 S.Ct. at 2770-75. Even if differences in local regulations governing the mix or amount of funding available to government-subsidized candidates meant that different matching funds systems entailed materially different benefits and burdens from a public policy perspective, which is not conceded, the question of a system's efficacy in advancing governmental interests is irrelevant to assessing the speech burden imposed by matching funds triggers or determining what level of scrutiny to apply.

III. This Petition should be Granted Because Both the Ninth Circuit and Respondents are Demonstrably Wrong to Ignore *Davis'* Reliance on *Pacific Gas & Elec. Co.*

Davis relied on *Pacific Gas & Elec. Co.*, 475 U.S. at 14, for the proposition that speech rights are infringed "where if the plaintiff spoke it could be forced . . . to help disseminate hostile views." *Davis*, 554 U.S. at ___, 128 S. Ct. at 2772. There is no question Arizona's matching funds trigger causes privately-financed candidates and their supporters to help disseminate hostile views whenever they raise or spend campaign money over a certain threshold. *Davis'* reliance on *Pacific Gas & Elec. Co.*, therefore, compels the conclusion that Arizona's matching funds trigger infringes speech rights.

Nevertheless, as did the Ninth Circuit, Respondents' briefs completely disregard the implications of *Davis'* approving citation to *Pacific Gas & Elec. Co.* McComish Pet. App. 2-46; Arizona Resp. *inter alia*; CEI Resp. *inter alia*. Indeed, Respondents have largely evaded *Davis'* reliance on *Pacific Gas & Elec. Co.* ever since District Court Judge Roslyn Silver made its implications clear:

> [T]he *Davis* court focuses not merely on the fact that the contributions limit differs . . . but also forcefully on the fact that 'the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the

> competitive context of electoral politics.' . . . Likewise, the Supreme Court has held (in a passage quoted approvingly in *Davis*) that, while one does not 'have the right to be free from vigorous debate, one does have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents.' *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 14 (1986) (emphasis in original). The 'statutorily imposed choice' provided by the BCRA was not sufficient to save its constitutionality . . . Though the Arizona Act's mechanism for funding differs, the effect, which forces a candidate to choose to 'abide by a limit on personal expenditures' or else endure a burden placed on that right, is substantially the same.

McComish Pet. App. 128-29.

By ignoring *Davis*' reliance on *Pacific Gas & Elec. Co.*, Respondents and the Ninth Circuit have disregarded the fact that matching funds triggers are fundamentally the same as the contribution trigger in *Davis* because they all cause rightful campaign fundraising and expenditures to help disseminate hostile speech by producing fundraising advantages for political opponents. Therefore, all matching funds triggers similarly penalize the exercise of First Amendment rights. It is this commonality that triggers strict scrutiny for *any* matching funds trigger under *Davis* and *Pacific Gas & Elec. Co.*

The failure and refusal of the Ninth Circuit to recognize that Arizona's matching funds trigger requires strict scrutiny under *Davis* and *Pacific Gas & Elec. Co.* is demonstrably wrong. Moreover, it is proof that the clash between the Ninth Circuit's decision and those of the Second, Eighth and Eleventh Circuits is real, substantial and stark. *Compare* McComish Pet. App. 28-38 *with Green Party of Conn. v. Garfield*, 616 F.3d 213, ___, Nos. 09-3760-cv(L), 09-3941-cv (CON), 2010 WL 2737153, *25-*28, 2010 U.S. App. LEXIS 14286, *77-*86 (2nd Cir. 2010); *Day v. Halloran*, 34 F.3d 1356, 1359-62 (8th Cir. 1994); *Scott v. Roberts*, 612 F.3d 1279, ___, No. 10-1321, 2010 WL 2977614, *10-*14, 2010 U.S. App. LEXIS 15897, *29-*42 (11th Cir. 2010).

CONCLUSION

This Court made the right decision on June 8, 2010, when it restored the district court's permanent injunction on Arizona's matching funds trigger, implicitly ruling that there was "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Rostker*, 448 U.S. at 1308. The Ninth Circuit is an outlier even among circuits that have upheld matching funds triggers. It is the only circuit that does not regard the fate of matching funds triggers to be tied to the fate of contribution limit triggers under the First Amendment. McComish Pet. 32-34. In this respect, the Ninth Circuit has actually created a new split between the

circuits. By fomenting this new circuit split, the Ninth Circuit has disrupted the uniformity that otherwise could have naturally arisen from lower courts logically applying *Davis* and *Citizens United* to heal the split between and among the First, Second, Fourth, Sixth, Eighth and Eleventh Circuits. McComish Pet. 28-34. Because the Ninth Circuit's decision is a demonstrably wrong impediment to reconciling this split, granting this petition is essential to restoring the rule of law.

Respectfully submitted,

CLINT BOLICK
NICHOLAS C. DRANIAS*
GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
500 East Coronado Road
Phoenix, AZ 85004
telephone: (602) 462-5000
facsimile: (602) 256-7045
ndranias@goldwaterinstitute.org

Counsel for Petitioners
**Counsel of Record*